A SIMPLIFIED GUIDE TO CONSTITUTIONAL ANALYSIS AND CHALLENGE

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As Don Quixote "impossibly" proposed to fight worldly injustice by making his utopian vision a reality, so can legal injustice be fought by constitutional challenge to the law under which it is wrought. While an extraordinarily difficult endeavor, a properly fashioned constitutional challenge can yield results not only for the case at issue but potentially thousands of others. When championing a criminal case in which defense seems hopeless, an examination and challenge of the law under which prosecution is advanced can often yield a far reaching result.

WHAT IS A CONSTITUTION?

The modern American constitution is based upon the concept of rule of law – that the law should govern a nation or state rather than the capricious will of individuals. As a participant in drafting the 1780 Massachusetts constitution, John Adams forwarded the concept of a government of laws, not men. As such, government should be based on clearly written laws promulgated by those to which they apply.

Popularized in the 19th century by British constitutional scholar A. V. Dicey, the rule of law holds that every citizen is subject to the law, including law makers themselves. It stands in contrast to any system of government where the rulers are held above the law. Government based upon the rule of law is a nomocracy. The framers of the original state and federal constitutions of the United States drafted their respective documents with this as their goal.

A written constitution is a system for implementing the rule of law - a schematic of rules about making rules to exercise power. It creates and governs the relationships between the judiciary, the legislature and the executive branches of government. Inspired by John Locke, the fundamental constitutional principle is that the individual can do anything but that which is forbidden by law, while the state may do nothing but that which is authorized by law. Locke expressed the "radical" view that government is morally obligated to serve people by protecting life, liberty, and property.

Chief Justice Warren Burger in *United States v. Nixon*, 418 U.S. 683 (1974) explained this process:

> Our system of government 'requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.'…(D)eciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. 'Notwithstanding the deference each branch must accord the others, the 'judicial Power of the United States' vested in the federal courts by Art. III, s 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court 'to say what the law is' with respect to the claim of privilege presented in this case.

Nixon ultimately held the President himself was subject to the subpoena power of Congress.

FEDERAL AND STATE CONSTITUTIONS

American constitutions codify the principles upon which the government they oversee are based and the procedure in which those governments make and enforce laws. They establish protections for violations of their mandate. Their theme is typically set out by their preamble:

> **The Preamble to the United States Constitution states:**
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> We the People of the United States, in Order to form a more perfect Union, establish Justice, ensure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.
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> **The Preamble to the Illinois Constitution states:**
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> We, the People of the State of Illinois - grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors - in order to provide for the health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality; assure legal, social and economic justice; provide opportunity for the fullest development of the individual; insure domestic tranquility; provide for the common defense; and secure the blessings of freedom and liberty to ourselves and our posterity - do ordain and establish this Constitution for the State of Illinois.

THE BILL OF RIGHTS

The first 10 Amendments to the United States Constitution make up the Bill of Rights. This is the source of most criminal constitutional litigation. Written by James Madison, the Bill

of Rights lists specific prohibitions on governmental conduct. The Fourteenth Amendment makes the Bill of Rights provisions enforceable against state governments.

The most significant amendments for criminal constitutional litigation are as follows:

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article One of the Illinois Constitution is the State version of the federal Bill of Rights. Due Process, Equal Protection, the Right against Self Incrimination, the Right to Representation, Freedom of Speech and Freedom of Religion are the most common arenas for the championing of individual rights.

LOCKSTEP

A person may have wider constitutional protections under the Illinois Constitution than the United States Constitution. The concept of lockstep refers the requirement of the states to adhere to federal decisional law when it comes to constitutional interpretation. In Illinois, *People v. Caballes*, 221 Ill. 2d 282 (2006) explains the construction of the Illinois constitution in light of the federal constitution and has adopted what it refers to as the "limited lockstep" approach of interpretation:

> This approach has been described as one under which a court will " 'assume the dominance of federal law and focus directly on the gap-filling potential' " of the state constitution…Under this approach, this court will "look first to the federal constitution, and only if federal law provides no relief turn to the state constitution to determine whether a specific criterion—for example, unique state history or state experience—justifies departure from federal precedent." (We) shall refer to it, for lack of a better term, as our "limited lockstep approach".

Caballes held a dog sniff of a vehicle during a routine traffic stop did not implicate the privacy clause of the Illinois constitution so federal constitutional precedent would apply.

STANDING

Before bringing a constitutional challenge, a party must be in a position to do so legally. The doctrine of standing is intended to insure that issues are raised and argued only by those parties with a real interest in the outcome of the controversy. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill.2d 200 (2000). To have standing to challenge the constitutionality of a statute, the challenger must have suffered or be in immediate danger of suffering a direct injury as a result of enforcement of the challenged statute. *People v. Greco*, 204 Ill. 2d 400 (2003)

As a general rule, if there is no constitutional violation in the application of a statute to a litigant, they do not have standing to argue that it would be unconstitutional if applied to third parties in hypothetical situations. *Broadrick v. Oklahoma*, 413 U.S. 601. A limited exception has been recognized for statutes that broadly prohibit speech protected by the First Amendment. This exception has been justified by the overriding interest in removing illegal deterrents to the exercise of the right of free speech. *Gooding v. Wilson*, 405 U.S. 518 (1972).

In *Sierra Club v. Morton*, 405 U.S. 727 (1972) Justice Douglas filed a dissenting opinion to the refusal of the majority to confer standing to an environmental group looking to stop commercial development on a national forest:

> The critical question of 'standing' would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature's ecological equilibrium

> should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?— Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.
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> Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes. The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases. The ordinary corporation is a 'person' for purposes of the adjudicatory processes, whether it represents proprietary, spiritual, aesthetic, or charitable causes.
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> So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life.

Under Douglas' theory, a tree could have standing to contest its destruction.

CONSTITUTIONAL INTERPRETATION

There is significant controversy as to how the federal constitution should be interpreted and applied. A constitutional challenge to a law calls into question the authority the legislature has to promulgate it under the proper auspices of the constitution. The two most significant views on how to interpret the constitution when addressing this issue are pragmatism and formalism.

According to the pragmatist (also known as realist) view, the Constitution should be seen as evolving over time as a matter of social necessity. This view was articulated by Justice Holmes in *Missouri v. Holland* 252 U.S. 416 (1920):

> (W)hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that amendment has reserved.

From a more modern opinion, Judge Richard Posner commented:

> A constitution that did not invalidate so offensive, oppressive, probably undemocratic, and sectarian law (as the Connecticut law banning contraceptives) would stand revealed as containing major gaps. Maybe that is the nature of our, or perhaps any, written

> Constitution; but yet, perhaps the courts are authorized to plug at least the most glaring gaps. Does anyone really believe, in his heart of hearts, that the Constitution should be interpreted so literally as to authorize every conceivable law that would not violate a specific constitutional clause? This would mean that a state could require everyone to marry, or to have intercourse at least once a month, or it could take away every couple's second child and place it in a foster home.... We find it reassuring to think that the courts stand between us and legislative tyranny even if a particular form of tyranny was not foreseen and expressly forbidden by framers of the Constitution. (Sex and Reason. Harvard University Press 1992)

Formalism (also known as originalism), on the other hand, posits that the constitution should be interpreted strictly on the intention of the original framers. Justice Clarence Thomas has routinely repudiated the pragmatist doctrine:

> Let me put it this way; there are really only two ways to interpret the Constitution – try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial. (Speech to the Manhattan Institute October 2008)

Justice Antonin Scalia has expressed similar sentiments. He commented:

> (There's) the argument of flexibility and it goes something like this: The Constitution is over 200 years old and societies change. It has to change with society, like a living organism, or it will become brittle and break. But you would have to be an idiot to believe that; the Constitution is not a living organism; it is a legal document. It says something and doesn't say other things.... (Proponents of the living constitution want matters to be decided) not by the people, but by the justices of the Supreme Court. They are not looking for legal flexibility, they are looking for rigidity, whether it's the right to abortion or the right to homosexual activity, they want that right to be embedded from coast to coast and to be unchangeable. (Speech to the Federalist Society, February 2006)

These theories clash by operation of the common law, which is built out of precedents which evolve over time. Constitutions are documents setting out a schematic for their orderly enforcement - one that can protect fundamental principles in their application to the group over which they apply. The mechanics get a bit tricky. This is ultimately accomplished by the promulgation of laws by the legislature involved and the application of the appropriate constitution interpretation to those laws by the appropriate courts.

STATUTORY CONSTRUCTION

The rules of statutory construction provide that the starting point in reviewing the constitutionality of statutes is that statutes promulgated by the legislature body at issue are

presumed constitutional and all reasonable doubts must be resolved in favor of upholding their validity. The hearing court must construe acts of the legislature so as to affirm their constitutionality and validity if it can reasonably be done. *People v. Steffens* (1991), 208 Ill.App.3d 252. It is the party challenging the constitutionality of a statute that bears the burden of clearly establishing the constitutional violation. *People v. Bales*, 108 Ill.2d 182 (1985). The only exception is when a statute infringes on a First Amendment Right where the State has the burden of proving constitutionality beyond a reasonable doubt.

When construing a statute, the reviewing court's fundamental objective is to give effect to the legislature's intent. The best indication of legislative intent is the plain and ordinary meaning of the statutory language. However, a reviewing court may also consider the underlying purpose of the statute, the evil sought to be remedied, and the consequences of construing the statute in one manner versus another. It is always presumed that the legislature did not intend to cause absurd, inconvenient, or unjust results. Furthermore, statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship, injustice, or prejudice to the public interest. *People v. Garcia*, 241 Ill.2d 416 (2011)

When the language of the statute is clear and unambiguous, it must be applied as written without resort to extrinsic aids or tools of interpretation. If the language of a statute is ambiguous, determination of legislative intent includes consideration of the purpose of the law, the evils it was intended to remedy, and relevant legislative history. Multiple statutes relating to the same subject are presumed to have been intended to be consistent and harmonious.
A statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; a statute must not be read so as to render any part superfluous or meaningless. However, the court is not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the legislature. *People v. Hawkins*, 2011 IL 110792 (2011)

BASIC CONSTITUTIONAL CHALLENGE ISSUES

Facial and As Applied

There are two types of constitutional challenge to a law: a facial challenge alleging that on its face, the law is unconstitutional in "every" context and an as applied challenge alleging the law is unconstitutional as to the challenger alone.

In an as applied challenge, the party challenging the statute contends that the application of the statute in the particular context in which the challenger has acted, or in which he proposes to act, would be unconstitutional. An as applied challenge requires a party to show that the statute violates the constitution as it applies to them. *People v. Garvin*, 219 Ill.2d 104 (2006). If a statute is unconstitutional as applied, the State may continue to enforce the statute in circumstances where it is not unconstitutional. *People v. Brady*, 369 Ill. App. 3d 836 (2nd Dist. 2007)

In a facial challenge, the party challenging the statute contends that there is no set of circumstances exist under which it would be validly applied. *People v. Blair*, 2013 IL 114122

(2013) When a statute is held facially unconstitutional, i.e., unconstitutional in all its applications, it is said to be void ab initio. Such a challenge to a statute will be significantly more difficult than challenging a specific application.

In *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015) Justice Sotomayor, speaking for the majority stated facial challenges under the Fourth Amendment are not categorically barred or especially disfavored:

> Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a "law is unconstitutional in all of its applications." Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008). But when assessing whether a statute meets this standard, the Court has considered only applications of the statute in which it actually authorizes or prohibits conduct. For instance, in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the Court struck down a provision of Pennsylvania's abortion law that required a woman to notify her husband before obtaining an abortion. Those defending the statute argued that facial relief was inappropriate because most women voluntarily notify their husbands about a planned abortion and for them the law would not impose an undue burden. The Court rejected this argument, explaining: The "[l]egislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Id., at 894, 112 S.Ct. 2791.
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> Similarly, when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant. If exigency or a warrant justifies an officer's search, the subject of the search must permit it to proceed irrespective of whether it is authorized by statute. Statutes authorizing warrantless searches also do no work where the subject of a search has consented. Accordingly, the constitutional "applications" that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.

Patel clarifies that a law must not be shown to be unconstitutional in "every" context but only where it impacts conduct.

Due Process and Equal Protection

Due process and equal protection are two distinct types of challenges. Each concept requires a different inquiry which emphasizes different factors. The concept of due process emphasizes the fairness of the relationship between the state and the individual, without regard to similarly situated individuals. On the other hand, equal protection places emphasis on the state's disparate treatment of groups of individuals similarly situated. *To Accomplish Fairness and Justice: Substantive Due Process*, 30 J. Marshall L. Rev. 95, James W. Hilliard (1996)

Strict Scrutiny and Rational Basis

The first step in challenging statutes under either due process or equal protection requires the same analysis for the standard of review to be applied. It is the nature of the right affected that dictates the level of scrutiny employed in determining whether the statute meets constitutional requirements. *People v. Kimbrough*, 163 Ill.2d 231 (1994).

If the challenged statute implicates a fundamental right or discriminates based on a suspect classification of race or national origin, the court subjects the statute to strict scrutiny analysis and will uphold the statute only if it is narrowly tailored to serve a compelling State interest. If the statute does not affect a fundamental constitutional right or involve a suspect classification, the rational basis test applies, requiring the statute bear a rational relationship to the purpose the legislature intended to achieve by enacting it. *People v. Shephard*, 152 Ill.2d 489 (1992).

A third tier of constitutional scrutiny lies between rational basis and strict scrutiny analyses. Intermediate scrutiny has been applied to review classifications based on gender, illegitimacy, and those classifications that cause certain content-neutral, incidental burdens to speech. To withstand intermediate scrutiny, the legislative enactment must be substantially related to an important governmental interest. *Napleton v. Village of Hinsdale*, 229 Ill.2d 296 (2008).

Due Process - Procedural and Substantive

Under substantive due process, a statute is unconstitutional if it impermissibly restricts a person's life, liberty or property interest. Substantive due process limits the state's ability to act, irrespective of the procedural protections provided. *People v. Cardona*, 2013 IL 114076. Under the banner of its police power, the legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process, which provides that a person may not be deprived of liberty without due process of law. *People v. Madrigal*, 241 Ill. 2d 463 (2011)

Procedural due process asserts that the deprivation at issue is constitutionally invalid because the process leading up to it was deficient. Whereas substantive due process limits the state's ability to act, irrespective of the procedural protections provided, procedural due process governs the procedures employed to deny a person's life, liberty or property interest. A procedural due process claim asserts that the deprivation at issue is constitutionally invalid because the process leading up to it was deficient. *In re Marriage of Miller*, 227 Ill.2d 185 (2007)

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas for the majority clearly illustrated the nature of a substantive constitutional right:

> The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale,

> seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a 'governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.' NAACP v. Alabama, 377 U.S. 288, 307, 84 S.Ct. 1302, 1314, 12 L.Ed.2d 325. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.
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> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Equal Protection

Equal protection requires that similarly situated individuals will be treated in a similar manner. *People v. Reed,* 148 Ill.2d 1 (1992). The equal protection clauses of the United States and Illinois Constitutions do not deny the State the power to draw lines that treat different classes of people differently, but prohibits the State from according unequal treatment to persons placed by a statute into different classes for reasons wholly unrelated to the purpose of the legislation. *People v. Shephard,* 152 Ill.2d 489 (1992).

To state a cause of action for a violation of equal protection, a challenger must allege that there are other people similarly situated to him, that these people are treated differently than him, and that there is no rational basis for this differentiation. *Safanda v. Zoning Board of Appeals,* 203 Ill.App.3d 687 (2nd Dist. 1990). A hearing court uses the same analysis in assessing equal protection claims under both the state and federal constitutions. *People v. Guyton*, 2014 IL App (1st) 110450

In *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.,* 347 U.S. 483 (1954) Chief Justice Warren for the majority held that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.

COMMON CONSTITUTIONAL CHALLENGES

Vagueness

Legislation may run afoul of the due process clause if it fails to give adequate guidance to those who would be law abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused. *Musser v. Utah*, 333 U.S. 95 (1948). Vague laws offend several important values.

First, because of the assumption that man is free to steer between lawful and unlawful conduct, laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489 (1982).

Overbreadth

The overbreadth doctrine is primarily concerned with facial challenges to laws under the First Amendment. A governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. *Zwickler v. Koota* , 389 U.S. 241 (1967) A statute is overly broad if it may reasonably be interpreted to prohibit conduct which is constitutionally protected. *People v. Klick*, 66 Ill.2d 269 (1977).

Overbreadth is a judicially created doctrine which recognizes an exception to the established principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court. The reason for this special rule in First Amendment cases recognizes an overbroad statute might serve to chill protected speech. A person contemplating protected activity might be deterred by the fear of prosecution. The doctrine reflects the conclusion that the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

Proportional Penalties/Cruel and Unusual Punishment

The United States Constitution and the Illinois Constitution have separate approaches for challenging unconstitutional punishments.

Amendment VIII of the United States Constitution states:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to the evolving standards of decency that mark the progress of a maturing society. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. *Estelle v. Gamble*, 429 U.S. 97 (1976)

The cruel and unusual punishments clause prohibits the imposition of inherently barbaric punishments under all circumstances. Under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the precept of justice that punishment for crime should be graduated and proportioned to the offense. *Weems v. United States*, 217 U.S. 349 (1910).

Cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty, a concept now irrelevant in Illinois. The sentencing classification considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive.

In *Solem v. Helm*, 463 U.S. 277 (1983) the United States Supreme Court found a sentence of life imprisonment without possibility of parole imposed upon the defendant who was convicted of uttering no account check for $100 and who had three prior convictions for third-degree burglary, one prior conviction for obtaining money under false pretenses, one prior conviction for grand larceny, and one prior conviction for third-offense driving while intoxicated, was significantly disproportionate to his crime, and was prohibited by Eighth Amendment, because uttering no account check was a nonviolent crime, defendant's prior felonies were relatively minor, the sentence was the most severe that state could impose on any criminal and only one other state authorized life sentence without parole in circumstances of defendant's case; possibility of commutation under state law did not save defendant's otherwise unconstitutional sentence:

> Helm's present sentence is life imprisonment without possibility of parole.24 Barring executive clemency, see infra, at 3015-3016, Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in Rummel v. Estelle. Rummel was likely to have been eligible for parole within 12 years of his initial confinement,25 a fact on which the Court relied heavily. See 445 U.S., at 280-281, 100 S.Ct., at 1142-1143. Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. See n. 6, supra. Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.

Harmelin v. Michigan, 501 U.S. 957 (1991) explained its approach for determining whether a sentence for a term of years is grossly disproportionate for a particular defendant's crime. A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison leads to an inference of gross disproportionality the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual. *Graham v. Florida*, 560 U.S. 48 (2010).

Article I, Section 11, of the Illinois Constitution states;

Limitation of Penalties After Conviction

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.

Also known as the Proportional Penalties Clause, it provides that all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. A proportionality challenge contends that the penalty in question was not determined according to the seriousness of the offense. A defendant may challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements. However, even if the elements are not identical, in Illinois a statute may also be challenged under the Eight Amendment cruel and unusual standard. *People v. Sharpe*, 216 Ill.2d 481 (2005)

CONCLUSION

While the championing of constitutional rights in the face of perceived injustice may seem quixotic, it should never be abandoned. In 1986, Justice White declared Georgia's sodomy statute did not violate the fundamental rights of homosexuals and that the Federal Constitution did not confer the fundamental right upon homosexuals to engage in sodomy. *Bowers v. Hardwick*, 478 U.S. 186 (1986). In 2003, Justice Kennedy overruled *Bowers* and held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied to adult males who had engaged in the consensual act of sodomy in the privacy of their home. *Lawrence v. Texas*, 539 U.S. 558 (2003) In 2015, Justice Kennedy held that the right to marry is a fundamental right inherent in the liberty of the person and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. *Obergefell v. Hodges, 135 S. Ct. 2584 (2015)*

It is often said in the defense of a criminal case, “If you don’t have the facts, pound the law, if you don’t have the law, pound the facts, and if you don’t have either, pound the table!” A

better alternative to the defense of a case without facts or law is to pound the constitution. Analyze the statute your client is charged with, see if it's been challenged in a particular constitutional way consistent with your issue and if not attack it. A determination a statute is facially unconstitutional or unconstitutional as it is applied requires both legal and evaluative analysis but also a determination of how it affects human affairs. In doing so, fear not to go tilting at windmills!